

# MANDATE

16-3831

Triestman v. Schneiderman

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22<sup>nd</sup> day of March, two thousand eighteen.

**PRESENT:**

ROSEMARY S. POOLER,  
REENA RAGGI,  
CHRISTOPHER F. DRONEY,  
*Circuit Judges.*

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Ben Gary Triestman,

*Petitioner-Appellant,*

v.

16-3831

Eric T. Schneiderman, Attorney General, The  
State of New York,

*Respondent-Appellee.*

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**FOR PETITIONER-APPELLANT:**

Ben Gary Triestman, Shady, N.Y.

**FOR RESPONDENT-APPELLEE:**

Lisa Ellen Fleischmann, Assistant Attorney  
General (Barbara D. Underwood, Solicitor  
General, Nikki Kowalski, Deputy Solicitor  
General for Criminal Matters, *on the brief*), for  
Eric T. Schneiderman, Attorney General, State of  
New York, New York, N.Y.

MANDATE ISSUED ON 05/21/2018

Appeal from the United States District Court for the Northern District of New York  
(Kahn, *J.*; Peebles, *M.J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND  
DECREED** that the judgment of the district court is **AFFIRMED**.

Appellant Ben Gary Triestman, proceeding pro se, appeals the October 19, 2016 judgment of the district court (Kahn, *J.*) dismissing his habeas petition filed pursuant to 28 U.S.C. §§ 2241 and 2254. In his petition, Triestman challenges a state family court order of protection, which requires him to stay away from his daughter and refrain from communicating with her, except for therapeutic visitations. The district court dismissed the petition on the ground that the order's restrictions on Triestman's access to his daughter did not render him "in custody" within the meaning of either Section 2241 or 2254. This Court granted a certificate of appealability on the issue whether Triestman met the "in custody" requirement of either statute. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

This Court reviews de novo the dismissal of a habeas petition on the ground that the petitioner is not "in custody" and is thus ineligible for habeas relief. *Vega v. Schneiderman*, 861 F.3d 72, 74 (2d Cir. 2017); *Nowakowski v. New York*, 835 F.3d 210, 215 (2d Cir. 2016). The "in custody" requirement "is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." *Hensley v. Municipal Ct., San Jose Milpitas Jud. Dist.*, 411 U.S. 345, 351 (1973). An individual may be "in custody" if she is "subject to restraints 'not shared by the public generally.'" *Id.* (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)). For purposes of the "in custody" inquiry, we analyze the severity of a restraint by looking to the

55 “nature, rather than the duration, of the restraint.” *Nowakowski*, 835 F.3d at 216.

56 Recently, in *Vega*, this Court considered whether a habeas petitioner was “in custody” as  
57 a result of an order of protection. 861 F.3d at 73. There, the habeas petitioner was required to  
58 abide by a two-year order of protection, which mandated that she stay away from a particular  
59 individual, as well as the individual’s home, school, business, and place of employment. *Id.* We  
60 held that the order of protection was not so restrictive as to place the petitioner “in custody” for  
61 habeas purposes. We observed that the petitioner’s sentence did not require her physical presence  
62 at any particular time or location, or otherwise affirmatively require her to do anything. *Id.* at 75.  
63 The only restraint on her freedom “was that she stay away from [the individual],” which we held  
64 to be a “narrow and pinpointed restriction [that was] neither severe nor significant.” *Id.* We also  
65 noted that the petitioner could “go anywhere at any time and do anything she want[ed] as long as  
66 she avoid[ed] an intentional confrontation” with the individual, and that such a restriction was  
67 “modest, not severe.” *Id.* We rejected the argument that an inadvertent encounter with the  
68 individual would violate the order, observing that N.Y. Penal Law § 215.50 requires the state to  
69 establish “intentional disobedience” of an order. *Id.* at 76.

70 So too here. Indeed, in deciding *Vega*, we cited with approval the district court’s decision  
71 in this case, which is the basis of the instant appeal. *Id.* at 75 (discussing *Triestman v.*  
72 *Schneiderman*, 1:16-cv-01079 (LEK/DEP), 2016 WL 6106467 at \*3 (N.D.N.Y. Oct. 19, 2016)).  
73 Reviewing the matter now, we agree that the district court correctly concluded that Triestman is  
74 not properly considered to be “in custody” as a result of the order of protection. The order does  
75 not require his presence at any particular time or location. Nor is there any other meaningful  
76 basis to distinguish our holding in *Vega*. Accordingly, we reject Triestman’s argument that the

requirement that he stay away from his daughter except for therapeutic visitations renders him “in custody” within the meaning of the habeas statutes.

We have considered the remainder of Triestman’s arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

 

A True Copy

Catherine O’Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 